VIRGINIA BOARD OF MEDICINE
LEGISLATIVE COMMITTEE

MINUTES

NOVEMBER 15, 2002

The Legislative Committee chaired by J. Kirkwood Allen met on Friday, November 15, 2002, at 8:30 a.m., at the Department of Health Professions ("DHP"). The meeting was called to order by Mr. Allen.

MEMBERS PRESENT: J. Kirkwood Allen, Chair
Robert J. Bettini, MD
Carol E. Comstock, RN
Clarke Russ, MD
Rev. LaVert Taylor

MEMBERS ABSENT: Joseph A. Leming, MD
Sue Ellen B. Rocovich, DO

STAFF PRESENT: William L. Harp, MD, Executive Director
Karen W. Perrine, Deputy Executive Director of Discipline
Robert Nebiker, Director, DHP
Elaine Yeatts, DHP Senior Regulatory Analyst
Deborah A. Ordiway, Recording Secretary

GUESTS PRESENT: Harry C. Beaver, MD, President of the Virginia Board of Medicine; Warren Koontz, MD; Joy Bechtold, VAHP; Scott Johnson, Medical Society of Virginia; Rick Shinn, VPCA and Liz Szabo, *The Virginian-Pilot*

ADOPTION OF AGENDA

Ms. Comstock moved to adopt the agenda. The motion was seconded and carried unanimously.

PUBLIC COMMENT ON AGENDA ITEMS

Scott Johnson from the Medical Society of Virginia stated that he wished to comment on a legislative matter after it was discussed. The Chair agreed to this request.

APPROVAL OF MINUTES OF SEPTEMBER 27, 2002

Dr. Bettini moved to approve the minutes of the Legislative Committee dated September 27, 2002. The motion was seconded and carried unanimously.

#1 Chart on Status of Regulations

Contained in the agenda packet was a copy of the Board of Medicine's regulatory actions.

Ms. Yeatts stated that there are three actions that need to go before the Executive Committee on December 13, 2002. The first being action on final regulations for outpatient anesthesia, the second action would be on licensed acupuncturists and the third action on periodic review for nurse practitioners.

Ms. Yeatts recommended that action on outpatient anesthesia be deferred until the January 24, 2003 meeting. The reason being is that the comment period does not end until November 22.

#2 Regulatory Actions

18 VAC 85-20-10 et seq., Regulations Governing the Practice of Medicine, Osteopathy, Podiatry & Chiropractic

Dr. Russ moved to table the agenda item on office-based anesthesia until the January 24, 2003 Legislative Committee. The motion was seconded and carried unanimously.

18 VAC 85-110-10 et seq., Regulations Governing Licensed Acupuncturists

Ms. Yeatts stated no public comment was received on this issue. The primary change would affect those applying for licensure who have attended acupuncture school outside the United States. The four-year requirement of practicing in another state would be eliminated.

Dr. Bettini moved to recommend this matter to the Executive Committee as presented. The motion was seconded and carried unanimously.

18 VAC 90-30-10 et seq., Regulations Governing the Practice of Nurse Practitioners

Dr. Bettini moved to recommend that the proposed changes to the Regulations Governing the Practice of Nurse Practitioners be adopted by the full Board. The motion was seconded and carried unanimously.

#3 Proposed legislative changes to improve the disciplinary system

Ms. Perrine stated that the board wanted the staff to look into hospital reporting, unprofessional conduct, standard of proof, assurances of voluntary compliance and referral to full board by informal conference committee.

Contained in the agenda packet was a copy of the bill that staff of the Board and Department had developed. Prior to receiving information from the staff, the Committee requested that Mr. Nebiker review Delegate Sears' proposed legislation, listed as Agenda Item four. Mr. Nebiker reviewed the proposal with the Committee. See next item for his comments.

After Mr. Nebiker concluded, the Committee requested that Ms. Perrine review staff's proposal, and compare to and contrast with Delegate Sears' proposal.

Ms. Perrine stated that the statute dealing with hospitals reporting disciplinary actions had been changed to clarify what should be reported regarding a health care professional and a added definition of adverse action. Adverse action shall include, but not be limited to, (i) limiting, reducing, restricting, placing on probation or on a leave of absence, suspending, revoking, denying, refusing or failing to renew or terminating clinical or practice privileges or membership in a hospital or other health care institution, (ii) imposing a summary, temporary or immediate suspension or practice, whether or not final under the hospital or other health care institution's procedures, when such action is taken in good faith that failure to take such action may result in substantial danger to the health of any person, and (iii) terminating employment or demoting, transferring or reassigning a health care professional for reasons relating to professional conduct or competence.

Further, staff's proposal did not include an amendment to § 54.1-2906(A)(2) but staff believed that Delegate Sears' amendment could help with reporting.

The Committee strongly recommended that a trigger for reporting be added to make it very clear that the hospital should report to the Board once the Medical Staff made a determination negatively affecting privileges. A section should be added to state that the hospital must report an initial recommendation or determination by the Medical Staff, or a committee thereof, to take or impose any adverse action as defined in the statute.

The staff's proposal would move the statute from § 54.1-2900 to § 54.1-2400 or 2500. Further it stated, "Any report required by this section shall be in writing directed to Director of the Department of Health Professions, or his designee, shall give the name and address of the person who is the subject of the report and shall fully describe the circumstances surrounding the facts required to be reported, including, but not limited to, (i) the details of incidents, acts or omissions giving rise to the report, (ii) the names of individuals with factual knowledge about the condition, conduct or action reported (iii) the names of individuals from whom the hospital or health care institution sought information to substantiate the facts required to be reported, and (iv) relevant medical records if patient care or the practitioner's health status is at issue. This report is to be made within five business days of when the chief administrative officer or chief of staff learns of such matter." This proposal was similar to Delegate Sears', but added (i) and the phrase "practitioner's health status" at the end of (iv). The Committee stated that this addition was very important. The Committee also recommended adding "acting" or "alternate" after the phrase "chief administrative officer or <u>chief of staff</u>" in the next to last paragraph of subsection A.

Ms. Perrine stated to handle nonreporting issues, sections E, F and F(1) were added. These provisions would provide that the Director of the Department of Health Professions would report the noncompliance issue to the health department and/or the attorney general to bring an action on behalf of the Commonwealth and there could be up to a $5,000 fine for failure to report. The Committee was in agreement to add a daily fine of not less than $5,000 with each day of noncompliance constituting a separate violation. The Committee did not support a maximum penalty. Dr. Russ was in favor of recovering expenses such as attorney fees and other fees that might be accrued and that such recovery is placed into this law.

The next proposal concerned the basis for disciplinary proceedings. In response to the Committee's request, staff reviewed other states' laws and provided options concerning a standard other than negligence. Staff also provided information on the standards for other boards at the Department of Health Professions. Delegate Sears' proposal mirrors the language for the Board of Dentistry. The Committee was in favor of the Dentistry standard regarding negligent conduct.

The next proposal concerned an amendment to the standard of proof. When there is a revocation or loss of a license then the matter had to be based on clear and convincing evidence. However, if it was otherwise, it was based on preponderance of the evidence. Another change to this section was that the decision of the Board, or a panel thereof, to (i) revoke or suspend a license, registration or certificate or (ii) to reinstate a license, registration or certificate shall be based upon clear and convincing evidence. All other determinations shall be based upon a preponderance of the evidence.

The next proposal was an amendment to § 54.1-2400 to add a provision to create a written assurance of compliance similar to Delegate Sears' proposal creating a confidential consent agreement. Staff's proposal contained subject matter constraints, but not time constraints.

Ms. Perrine stated the last proposal amended § 54.1-2919 to expedite resolution of cases. The change would remove the requirement that the Board has to receive and act on a referral to a formal hearing by an informal conference. It mirrors the wording found in the Board of Nursing's statute for such referrals.

Dr. Russ stated that the Legislative Committee's comments be submitted to Delegate Sears with the notation that they do not necessarily represent the whole Board of Medicine nor the Executive Committee.

Scott Johnson, Medical Society of Virginia, was then allowed to comment. He stated that in regard to the draft legislation that pertained to the written assurance of compliance, the draft that staff has prepared gave to all health regulatory boards the ability to make judgments as to when the written assurance is used. In Delegate Sears' proposal the language is more restrictive. It could only be used once every ten years. He also pointed out that although Delegate Sears' draft required all settlements reported, it did not make the mere fact of settlement. Mr. Johnson stated that the Medical Society would continue to work with the board.

Rev. Taylor moved that this Committee would pass the recommendations from the staff regarding the legislation proposed by Delegate Sears onto Delegate Sears, onto the Executive Committee and ultimately to the full Board. Dr. Russ added an amendment that it also be submitted to the Secretary's office. Rev. Taylor accepted this amendment. Ms. Comstock added an amendment that it also state these recommendations from the staff and the Legislative Committee. Rev. Taylor accepted this amendment. The motion was seconded. Mr. Nebiker stated he wanted it clear that this recommendation includes changing the standard for action to the same standard that exists for the Board of Dentistry. Rev. Taylor stated that is what he understood. The motion carried unanimously.

#4 Proposed legislation from the Honorable Winsome Sears (Delegate – 90th District)

Prior to Ms. Perrine's review for the Committee, Mr. Nebiker stated that Delegate Sears took an interest in fashioning legislation that would improve the disciplinary process. Contained in the agenda packet was a draft copy of Delegate Sear's bill. The bill has not been pre-filed.

Mr. Nebiker stated there are two main thrusts of this bill. One, it addresses the issue of earlier hospital reporting and it provides an enforcement mechanism should it not happen. Secondly, it deals with the ability of the Board of Medicine to take action for something other than gross negligence and there is a mechanism in this that would allow under limited circumstances the ability of the board to use a confidential process to act on allegations of misconduct that might have significant impact for the board and its workload and its ability to intervene earlier.

Mr. Nebiker covered the high points of the bill. There is a mechanism to impose civil fines up to $25,000 on healthcare institutions for failure to report. If the fine is not paid, a mechanism is in place wherein the Commissioner of Health would not renew the license of the hospital who failed to pay the civil fine for failure to report.

The proposed bill also contains a confidential consent agreement. This agreement would allow any board within the Department of Health Professions to enter into a confidential agreement where there would be a finding of fact and there may be an admission or a finding of a violation. It is a two-part agreement between the practitioner and the board. This agreement would not be a public document. The confidential consent agreement shall not be considered either a notice or order of any health regulatory board, but it may be considered by a board in future disciplinary proceedings. There are limitations on its use. The proposed language reads as follows: "A board shall not enter into a confidential consent agreement if there is probable cause to believe the practitioner has (i) demonstrated gross negligence or intentional misconduct in the care of patients, (ii) caused serious patient harm through negligence or (iii) conducted his practice in such a manner as to be a danger to the health and welfare of his patients or the public. A board shall enter into a confidential consent agreement with a practitioner involving a standard of care violation only once during any 10-year period." This agreement could be a tool that could be used to dispose of a large volume of cases that may come before the board dealing with practitioner profiling, prescription blanks and continuing education cases.

Section 54.1-2400.2 is the provision in the statute that keeps certain disciplinary information confidential. Currently for the most part, the board can only release disciplinary information pursuant to a court order. Section 54.1-2400.2(4) strengthens that concept by stating "Pursuant to an order of a court of competent jurisdiction for good cause arising from extraordinary circumstances being shown."

Section 54.1-2400.2(6)(B) further tightens the ability to release or use confidential information. This section states "In no event shall confidential information received, maintained or developed by any board, or disclosed by the board to others, pursuant to this section, be available for discovery or court subpoena or introduced into evidence in any civil action."

Section 54.1-2400.4 changes a reporting requirement that now exists for mental health providers. Under current law when a mental health provider treating a patient discovers the fact that that the patient had been the subject of some sort of misconduct by a previously treating healthcare practitioners, the practitioner must advise that patient on the ability to complain to the Department of Health Professions. This section changes that requirement and puts the duty on the part of the practitioner to file the report. The penalty has increased from $100 to $5,000 for failure to take that action.

Section 54.1-2408.2 changes the period of revocation to be a minimum of three years.

Section 54.1-2505 gives the power to the Director of the Department of Health Professions to impose a civil penalty against any person who is not licensed by a health regulatory board for failing to report a violation.

Section 54.1-2506 gives the Director the authority to issue summonses for violations of statutes and regulations governing the unlicensed practice of professions regulated by the Department. The Director may delegate such authority to investigators appointed by him. In the event a person issued such a summons fails or refuses to discontinue the unlawful acts or refuses to give a written promise to appear at the time and place specified in the summons, the investigator may appear before a magistrate or other issuing authority having jurisdiction to obtain a criminal warrant pursuant to § 19.2-72.

Section 54.1-2506.01 states that the Department shall investigate all complaints that are within the jurisdiction of the relevant health regulatory board received from (i) the general public and (ii) all reports received pursuant to §§ 54.1-2400.4, 54.1-2709.3, 54.1-2709.4, 54.1-2906, 54.1-2908, or 54.1-2909.

Section 54.1-2906 is the requirement for hospitals and other health care institutions to report disciplinary actions against and certain disorders of health professionals. There is a 30-day requirement for the chief administrative officer and the chief of staff of every hospital to report this information.

Section 54.1-2911 adds a requirement for two citizen members to be members of the executive committee.

Section 54.1-2915 changes the standard from gross ignorance or carelessness in practice or gross malpractice to intentional or negligent conduct in the practice of any branch of the healing arts that causes or is likely to cause injury to a patient or patients.

Mr. Nebiker stated there is a requirement for the Joint Legislative Audit and Review Commission to come and examine these changes during 2005 and the study shall be complete by November 30, 2006.

#5 Independent authority

Dr. Harp stated that the staff requests a continuance on this matter. The Committee agreed.

ADJOURNMENT

With no further business to discuss, the Legislative Committee of the Board of Medicine adjourned.

_____
J. Kirkwood Allen
Chair

_____
William L. Harp, MD
Executive Director

_____
Deborah A. Ordiway
Recording Secretary